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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE APPLICATION OF: CONFIRMATION NO. 9280
Ramon Efrain VASQUEZ

ART UNIT: 1761

APPLICATION NUMBER: 10/728,827 EXAMINER: PRATT, Helen F.

FILED: 12/8/2003 :

FOR: AQUEOUS SOLUTION OF AGREEABLE
SALTINESS TASTE

37 CFR 1.192 APPEAL BRIEF

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Commissioner for Patents
P.O. Box 1450
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Sir:

In response to the final office action mailed 4/9/2007, and futher to the Notice of Appeal filed 9/19/2007 with EOT (2 months), the applicants submit this appeal brief with EOT (3 months) filed herewith.

I. 37 CFR 41.37(c)(i) - Real Party in Interest

The real party in interest is Ecosalt Inc., a Delaware Corporation.

II. 37 CFR 41.37(c)(ii) - Related Appeals and Interferences

There are no related appeals or interferences.

III. 37 CFR 41.37(c)(iii) - Status of Claims

Claims 1, 4 - 8, and 10 - 17 are pending, rejected, and appealed. The claims stand or fall together.

IV. 37 CFR 41.37(c)(iv) - Status of Amendments

An amendment was filed in support of an RCE on 10/23/2006. No amendment to the claims was filed subsequent to the final rejection mailed 4/9/2007.

V. 37 CFR 41.37(c)(v) - Summary of Claimed Subject Matter

1. A sodium-free or low-sodium aqueous seasoning solution for foodstuffs [0002, lines 1 - 2], consisting of between 60 and 85% by weight of purified water [0003, line 2], between 5 and 15% by weight of potassium chloride [0003, line 3], between 8 and 18% by weight of tartaric acid [0003, lines 3 - 4; taken with 0036, line 6], between 1 and 3% by weight of a magnesium salt [0037, line 1], and between 2 and 15% by weight a calcium salt [0034, line 6].

17. A method for making a sodium-free or low-sodium aqueous seasoning solution [0033, line 1] for foodstuffs consisting of between 60 and 85% by weight of purified water [0003, line 2], between 5 and 15% by weight of potassium chloride [0003, line 3], between 8 and 18% by weight of tartaric acid [0003, lines 3 - 4; taken with 0036, line 6], between 1 and 3% by weight of a magnesium salt [0037, line 1], and between 2 and 15% by weight a calcium salt [0034, line 6], said method comprising: a) measuring the required amounts of solid raw materials, which may be finely or coarsely powdered, in scales or crystals [0033, lines 6 - 7], b) measuring the required amount of distilled, demineralized water [0033, line 8], c) mixing the solid compounds with about 50% of said water until a slurry is formed [0033, line 9], and d) adding the remainder of the water to the slurry and agitating until it retains the characteristics of a stable homogeneous solution [0033, line 10].

VI. 37 CFR 41.37(c)(vi) - Grounds of Rejection to Be Reviewed on Appeal

Whether the rejections of claims 1, 4 - 8, 10 - 12 and 17 under 35 USC 103(a) as being unpatentable over Sheikh (US 5,213,838), hereinafter "Sheikh" are improper and should be reversed.

Whether the rejections of claims 13 - 16 under 35 USC 103(a) as being unpatentable over Sheikh (US

5,213,838) in view of Tanpei (58-081758) are improper and should be reversed.

VII. 37 CFR 41.37(c)(vii) - Argument

A. Rejections of Claims 1, 4 - 8, 10 - 12 and 17 under 103(a) as being Unpatentable over Sheikh

The examiner rejects claims 1, 4 - 8, 10 - 12 and 17 under 35 USC 103(a) as being unpatentable over Sheikh. These rejections should be reversed for the following reasons.

The present invention relates to a low-sodium aqueous solution for seasoning food and which contains potassium chloride, a very bitter compound. The solution also has a specific ingredient, tartaric acid, in a concentration of 8 - 18% to mask that potassium bitterness. As the Examiner appears to concede, Sheikh does not disclose or suggest the use of tartaric acid in a low-sodium product based on potassium chloride.

The applicants argued that the Sheikh reference alone cannot establish a *prima facie* case of obviousness, since it does not disclose the use of tartaric acid in a low-sodium composition, or suggest that tartaric acid is equivalent to citric acid in a food seasoning, particularly food that contains potassium chloride. Without citing this element of the claims in the prior art, a *prima facie* case has not been made out.

The examiner responded in the final office action of 4/9/2007 (page 5), agreeing that Sheikh does use citric acid, not tartaric acid, but asserting that applicant is only claiming equivalents. This "equivalence" is purported to be shown by applicant's original claims and specification which discloses that "All types of acids that are acceptable for food seasoning are contemplated - preferably, citric acid, tartaric acid and/or fumaric acid." The examiner also argues that:

By the presentation of this Markush group, appellant has made the representation that for the purpose of the claimed invention, the elements of the group are equivalents. Having made this representation, appellants may not now argue that these two elements are not equivalents". *In re Skall*, 187, USPQ 481 9CCPA 1975.

However, the examiner's conclusion of obviousness is based on impermissible hindsight reasoning. To establish a *prima facie* case of obviousness, the teaching or suggestion to make the claimed combination,

and a reasonable expectation of success, must both be found in the prior art and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). MPEP 706.02(j). On this ground alone, the rejections cannot stand because the examiner has not cited any other information about tartaric acid than what is found in the application.

Moreover, *In re McLaughlin* states that:

...any judgement on obviousness is in a sense necessarily a reconstruction based on hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill in the art at the time the claimed invention was made and does not include knowledge gleaned only from applicants disclosure, such a reconstruction is proper.

In re McLaughlin 443 F.2d 1392, 1395, 170 USPQ 209, 212 (CCPA 1971).

See MPEP 2145 A.

But here the examiner is not even relying on *knowledge* "gleaned only from the applicant's disclosure," because that disclosure never teaches, as a matter of scientific fact, that citric acid and tartaric acid have the same perceived effects on the bitterness of potassium chloride in food.. The examiner is merely asserting that the application says so, based on her interpretation of what Markush language means in a legal context. This legalistic approach cannot supply the facts missing the obviousness case. Markush language is used as a way to list multiple related elements within one patent claim. It is a legal doctrine, not a factual relationship or a scientific convention.. The examiner is taking a legal formalism and leaping to an unsupported factual conclusion. Accordingly, the rejection should be reversed.

B. Rejections of Claims 13 - 16 under 103(a) as being Unpatentable over Sheikh in view of Tanpei (58-081758)

The examiner rejects claims 13 - 16 under 35 USC 103(a) as being unpatentable over Sheikh in view of Tanpei. The supporting reference, Tanpei, is cited to show the use of flavoring agents in a potassium chloride product is known. However, only citric acid is disclosed, not tartaric acid. Accordingly, Tanpei fails to cure the deficiencies of the primary reference as discussed above.

XVII. 37 CFR 41.37(c)(viii) - Claims Appendix

A claims appendix is Appendix 1.

XVIII. 37 CFR 41.37(c)(ix) - Evidence Appendix

An evidence appendix is Appendix 2.

XIX. 37 CFR 41.37(c)(x) - Related Proceedings Appendix

A related proceedings appendix is Appendix 3.

Respectfully Submitted,

2/8/2008 /RobertHahl#33,893//
DATE Registration No. 33,893

Attorney of Record

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APPENDIX 1 - CLAIMS APPENDIX

Appealed Pending Claims

Claims 1, 4 - 8, and 10 -17 are pending in the subject application. Claims 2, 3 and 9 have been cancelled. All pending claims are appealed.

1. A sodium-free or low-sodium aqueous seasoning solution for foodstuffs, consisting of between 60 and 85% by weight of purified water, between 5 and 15% by weight of potassium chloride, between 8 and 18% by weight of tartaric acid, between 1 and 3% by weight of a magnesium salt, and between 2 and 15% by weight a calcium salt.
2. (cancelled)
3. (cancelled)
4. The seasoning solution of claim 1, wherein the magnesium salt is magnesium chloride.
5. The seasoning solution of claim 1, wherein the calcium salt is calcium chloride.
6. The seasoning solution of claim 1, wherein purified water is distilled and demineralized water.
7. The seasoning solution of claim 1, which is colorlessness, odorlessness, and has heightened salinity in taste.
8. The seasoning solution of claim 1, which is stable and does not require refrigeration.
9. (cancelled)
10. The seasoning solution of claim 1, wherein natural or artificial essences, colorants, and aromatizers are added.
11. The seasoning solution of claim 1, which comprises a stable aqueous solution adapted as a seasoning composition for foodstuffs before, during, and after cooking.
12. The seasoning solution of claim 1, further comprising up to 20% by weight sodium chloride.

13. The seasoning solution of claim 10, wherein flavoring agents comprise between 0.05 and 2.5% by weight, and are selected from the group consisting of essences of garlic, pepper, onion, lemon, celery, sweet basil, thyme, parsley, sweet red pepper, and spicy red pepper, and mixtures thereof.

14. The seasoning solution of claim 1, further comprising between 0.05 and 2.5% by weight stabilizing agents fit for human consumption selected from thickening agents and preservatives.

15. The seasoning solution of claim 1, provided for household use in a bottle with a dropper or sprayer.

16. The seasoning solution of claim 1, wherein said solution acts as a dietary supplement of dietary minerals, supplying magnesium, calcium, and potassium.

17. A method for making a sodium-free or low-sodium aqueous seasoning solution for foodstuffs consisting of between 60 and 85% by weight of purified water, between 5 and 15% by weight of potassium chloride, between 8 and 18% by weight of tartaric acid, between 1 and 3% by weight of a magnesium salt, and between 2 and 15% by weight a calcium salt, said method comprising: a) measuring the required amounts of solid raw materials, which may be finely or coarsely powdered, in scales or crystals, b) measuring the required amount of distilled, demineralized water, c) mixing the solid compounds with about 50% of said water until a slurry is formed, and d) adding the remainder of the water to the slurry and agitating until it retains the characteristics of a stable homogeneous solution.

APPENDIX 2 - EVIDENCE APPENDIX

There is no such evidence submitted.

APPENDIX 3 - RELATED PROCEEDINGS APPENDIX

There are no related proceedings.

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